In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1047

CITY OF CHICAGO AND BOARD OF TRADE OF THE CITY OF CHICAGO, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

No. 1048

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., APPELLANTS

v.

CITY OF CHICAGO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO DISMISS AND AFFIRM

Pursuant to Rule 16(1) (c)–(d) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the appeal be dismissed in No. 1047 and that the judgment of the district court be affirmed in No. 1048.

336-768—69

STATEMENT

These are separate appeals—in No. 1047 by the City of Chicago and Board of Trade of the City of Chicago (referred to herein collectively as "Chicago") and in No. 1048 by the Illinois Central Railroad Company and others [1] ("the railroads")—from the judgment of a three-judge district court on review of orders of the Interstate Commerce Commission (J.S. App. A and B, reported at 291 F. Supp. 858).[2] The court below vacated and set aside the Commission's orders, remanding the cause to the Commission for further proceedings. Neither the Commission nor the United States has appealed;[3] instead, the Commission has already reopened its proceedings for reconsideration and further hearings in light of the district court's opinion.

This case concerns railroad rates for transportation of soybeans destined for export. The facts are undisputed. The rates from Illinois points of origin to the port of Chicago have been, on the whole, lower than the rates from those points to ports on the Gulf of Mexico, although the rate per mile to Gulf ports is much lower (J.S. App. A–4—A–5). Prior to the Com-

[1] Chicago & Eastern Railroad Company; Gulf Mobile and Ohio Railroad Company; Norfolk and Western Railroad Company; Allied Mills, Inc.; Central Soya Co., Inc.; Lauhoff Grain Company; Ralston Purina Company; and New Orleans Traffic and Transportation Bureau.

[2] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 1047.

[3] The United States, as statutory defendant, filed a neutral answer in the district court, neither supporting nor opposing the Commission orders.

mission's orders involved here, however, some railroad rates for soybeans were in fact *higher* to Chicago than to the more distant Gulf ports (J.S. App. A–4).

Chicago filed a complaint with the Commission contesting all the export soybean rates from Illinois points of origin to Chicago, both those that were higher and those that were lower than the Gulf port rates. The complaint contended that all of the rates were unjust and unreasonable, in violation of Section 1(5) of the Interstate Commerce Act, 49 U.S.C. 1(5); and that they were unduly prejudicial to the port of Chicago and unduly preferential to the Gulf ports, in violation of Section 3(1) of the Act, 49 U.S.C. 3(1) (J.S. App. C–1). Complainants sought an order requiring the railroads to reduce the rates on Chicago shipments to approximately the same rate-per-mile basis as the rates to the Gulf ports.

Following extensive hearings, the Commission's hearing examiner concluded that none of the rates in question had been shown to be unjust and unreasonable, but that all of the rates, whether higher or lower, resulted in an undue prejudice to Chicago (J.S. App. C–5).

Thereafter, Division 2, composed of three members of the Commission, affirmed the hearing examiner's recommendation that the complainants had failed to prove the unjustness or unreasonableness of the existing rail rates under Section 1(5). With regard to the Section 3(1) issue, however, the Division held that the port of Chicago was unduly prejudiced only inso-

far as the rates were higher than those to the competing Gulf ports, and ordered that such prejudice be ended (J.S. App. C–12—C–14). The Division rejected the complainants' contention that Chicago was unduly prejudiced where the rates were either lower than or the same as the rates to the Gulf ports, finding no showing that Chicago was unable to compete effectively at such rates for the available soybean traffic (J.S. App. C–13—C–14).

Subsequently the full Commission, by vote of eight to two, affirmed the decision of Division 2. Noting that the port of Chicago already dominated the export market for soybeans due to its geographical proximity to the Illinois producing areas and to its rate advantage in most instances, the Commission held that the complainants had failed to show that all rates to Chicago were unduly prejudicial (J.S. App. D–9 to D–12). The Commission rejected the contention that Chicago was entitled to a scale of rates based exclusively on distance from the soybean producing areas. Such a rate scale, it held, would unduly disadvantage others, including the more distant but otherwise competitively viable Gulf ports, by depriving them of the right to compete freely for the available soybean traffic; this would contravene the purposes of Section 3(1). (J.S. App. D–10—D–11.) Accordingly, except for the adjustment in the limited number of rates which had been higher to Chicago than to the Gulf ports, the Commission denied the relief requested by the complainants (J.S. App. D–12).

Chicago brought suit in the district court, and the court vacated and set aside the orders of the Com-

mission. The court held that the Commission had made inadequate subsidiary findings to support its conclusions with respect to the Chicago rate pattern (J.S. App. A–6—A–11). The court expressly declined to reach the question whether the Act permits equalization of rates for unequal distances (J.S. App. A–11).

ARGUMENT

1. The appeal by the Chicago parties, No. 1047, should be dismissed. Those parties were the initiators of this action in the district court, and the district court granted the relief they sought, setting aside the Commission's orders. They are dissatisfied because the district court declined to decide—for the guidance of the Commission on remand—that the Act as a matter of law requires that rates closely follow differences in distance. Such a ground has been rejected in the past,[4] but the district court found it unnecessary to reach the question because it found that in any event the Commission had inadequately justified its conclusions as to the propriety of the rates in question. These appellants' complaint is simply that they prevailed in the district court for the wrong reason, but that does not give them standing to appeal and thus their appeal should be dismissed. *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206–207; *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U.S. 151, 176; *New York Tel. Co.* v. *Maltbie*, 291 U.S. 645.

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[4] *City of Galveston* v. *United States*, 257 F. Supp. 243, 247–248 (S.D. Tex.), affirmed *per curiam*, 386 U.S. 269; *New York Central R. Co.* v. *United States*, 207 F. Supp. 483, 490–491 (S.D. N.Y.); *Boston & Maine R. Co.* v. *United States*, 202 F. Supp. 830, 837 (D. Mass.), affirmed *per curiam* by an equally divided court, 373 U.S. 372.

As noted above, the Commission has already reopened its proceeding, in compliance with the district court's order, to consider further what justifications there may be, consistent with Sections 1(5) and 3(1) of the Act, for the rate pattern that resulted from its prior order. The district court wisely declined to prejudge the Commission's further inquiry,[5] and the Chicago appellants have no standing to seek to compel it to do so.

2. The appeal by the railroads, No. 1048, is without substance. It raises only technical contentions that the district court misapprehended the nature of the Commission proceeding and the burden of proof therein, and that in specifying certain factors as not adequately considered by the Commission the court improperly infringed the Commission's exercise of its expertise on remand. We do not read the court's opinion as circumscribing those further proceedings. See *United States* v. *Saskatchewan Minerals,* 385 U.S. 94; *Arrow Transp. Co.* v. *Cincinnati, N.O. & T. Pac. R.R.,* 379 U.S. 642; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145. Rather, the court did no more than suggest, in view of the theories on which the Commission appar-

[5] In asserting that the Commission has concluded that undue prejudice can result only where rates are unequal (J. S., No. 1047, 14) appellants attribute to the Commission a view which it does not hold. On the contrary, the Commission has found in appropriate circumstances that equal rates to competing ports may unduly prejudice one of the ports. See *City of Wilmington* v. *Alabama G. S. R. Co.,* 316 I.C.C. 709, 725–726, affirmed, 319 I.C.C. 620; *Galveston Commercial Ass'n* v. *Galveston, H. & S. A. Ry. Co.,* 128 I.C.C. 349, 379, 389.

ently proceeded, other factors as appropriate matters of Commission inquiry in passing upon the ultimate questions. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 374.

CONCLUSION

The appeal should be dismissed in No. 1047, and the judgment of the district court should be affirmed in No. 1048.

Respectfully submitted.

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